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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

AARON HENRY, et al.,

Petitioners,

versus

CLAIBORNE HARDWARE CO., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No.

AARON HENRY, et al.,
Petitioners,

versus

CLAIBORNE HARDWARE CO., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CRCUIT

The petitioners, Aaron Henry, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 23, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 444 F.2d 1300 and appears in the Appendix filed with this petition. The opinion of the District Court for the Northern District of Mississippi is reported at 50 F.R.D. 251, and appears in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was entered on June 23, 1971. A timely petition for rehearing *en banc* was denied on September 16, 1971, and on October 1, 1971, the mandate of the Court of Appeals was stayed by order of the Fifth Circuit for thirty days to permit petitioners to file this petition. This petition for certiorari was filed within 90 days of the denial of the petition for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a District Court has jurisdiction pursuant to 28 U.S.C. §§ 1343 and 1331 of a complaint filed by persons and organizations engaged in civil rights activities seeking Federal injunctive relief against pending state court civil proceedings filed by private persons pursuant to unconstitutional state statutes and brought in bad faith for purposes of harassing petitioners in the exercise of rights protected by the First and Fourteenth Amendments?

2. Whether private persons who seek to harass petitioners in the exercise of their constitutionally protected rights of expression by filing a state civil suit for damages and injunctive relief pursuant to state statutes which purport to authorize the suit and who seek to interfere with petitioners' free exercise of their rights through the machinery of the state courts are

immune from suit under 42 U.S.C. § 1983 because of the "color of law" requirement of that statute?

3. Whether the District Court was authorized, under the above circumstances, to entertain the cause of action for relief under the Constitution and laws of the United States where the complaint alleges and preliminary proof shows that the plaintiffs are threatened with irreparable injury to fundamental Federally protected constitutional rights resulting from the attachment of their funds pursuant to patently unconstitutional state prejudgment attachment proceedings and from the imminent enforcement of unconstitutional state statutes abridging free speech.

4. Whether the Court of Appeals erred in ordering that the amended complaint, which included allegations that the state statutes invoked by the state court complainants in their state civil action were unconstitutional on their face as abridging free expression and as applied for the purpose of discouraging Federally protected activities, should be dismissed altogether on abstention principles and in deference to state court proceedings.

5. Whether the District Court had jurisdiction to issue a preliminary injunction temporarily to preserve the status quo and to protect its jurisdiction pending its determination of complex questions of Federal jurisdiction and its final determination of whether a permanent injunction was authorized and required.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision thereof is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. § 1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege

or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners (plaintiffs below) are the National Association for the Advancement of Colored People (NAACP) the Mississippi State Conference of the NAACP, various Mississippi NAACP branches, and individual black citizens of Mississippi, whose class representative is Aaron Henry, president of the State Conference and the Coahoma County Branch of the NAACP. For several years, individual plaintiffs sought to eliminate, by peaceful means, racial discrimination

practices by white merchants and local town officials in the Town of Port Gibson, Mississippi. The fundamental goals of this peaceful protest were to achieve fair employment practices by the merchants, to secure fair treatment of black customers through the use of courtesy titles and the like, and to eliminate racial discrimination by public officials. As part of this effort, plaintiffs concluded that economic pressure was likely to be an effective method of achieving their goals, and encouraged — by occasional picketing, leafleting, public meetings, and conversations — and participated in a selective buying campaign in early 1966 against many of the white Port Gibson merchants whom they believed were responsible for perpetuating racial discrimination. The record here shows that all these activities were generally peaceful.

On November 4, 1969 twenty-three merchants from Port Gibson, Mississippi, who were allegedly affected by the boycott (the respondents here) filed a bill of complaint in equity in Hinds County (Jackson), Mississippi, Chancery Court against the National Association for the Advancement of Colored People (NAACP), a New York corporation domiciled in Mississippi, Mississippi Action for Progress (MAP), a federally-funded anti-proverty program resident and incorporated in Mississippi, and almost 150 individual residents of Mississippi seeking inter alia, to (1) attach all the funds, property and effects of the NAACP and its branches in Mississippi, (2) enjoin the boycott, all picketing associated therewith, and all other activities in connection with the boycott, such as advising or asking persons not to shop at the boycotted stores, and (3) award

the merchants damages of over $3.5 million, jointly and severally against all the state court defendants. The suit was based on the Mississippi anti-trust statutes, Miss. Code §§ 1088, 1089, and 1092 (Recomp. 1956), the state "secondary boycott" statute, Miss. Code § 2059.3 (Supp. 1971), and general tort allegations.

Upon the filing of the bill of complaint, the Clerk of the Chancery Court for the First Judicial District of Hinds County, without any notice or hearing to the defendants in the action, summarily served writs of attachment on fifty-six banks throughout the state attaching the bank accounts not of the state court defendants, but of the Mississippi State Conference of the NAACP and all local and county branches of the NAACP in the state, under the authority of Mississippi's non-resident, absent or absconding debtor attachment statute, Miss. Code § 2730 (Recomp. 1956). The state court defendants have moved in state chancery court by general and special demurrer to have the complaint dismissed and these attachments dissolved, but the general and special demurrers were overruled on February 27, 1970, and the chancellor has to date refused to dismiss the complaint or to dissolve the attachments.

Three days after the state chancery suit was filed and the NAACP funds attached, on November 7, 1969, two NAACP organizations, the State Conference and the Coahoma County Branch, filed a class action complaint in United States District Court for the Northern District of Mississippi alleging a violation of constitu-

tional rights actionable under 42 U.S.C. § 1983 and seeking an injunction against attachment of their funds. A hearing was held on December 1, 1969, at which plaintiff Aaron Henry testified that the embargo on the funds of the NAACP State Conference and all county branches caused by the attachments had brought to a "complete halt" the efforts of the NAACP to gain equal treatment and equal justice for black people throughout the state, including voter registration, emergency welfare and relief, and school desegregation activities. Mr. Henry indicated that as a result of the filing of the state chancery suit, there had been a substantial decline in participation in picketing activities to end racial discrimination, fund-raising for NAACP activities, and NAACP membership and participation throughout the state. The pendency of damage claims in the millions of dollars had created, according to his testimony, a climate of fear and a resulting reluctance on the part of black people to join or identify with the NAACP or to participate in the exercise of First Amendment rights. A temporary restraining order and then a preliminary injunction were issued releasing the attached funds upon posting of substantial bonds.

On December 15, 1969, the same plaintiffs as representatives of the class of defendants in the state chancery suit, with added parties, filed an amended complaint to enjoin the state chancery suit on the grounds that the state chancery suit was brought in bad faith, has no basis in fact, and was filed exclusively for purposes of harassing the civil rights demon-

strators and interfering with their First Amendment rights; that the state statutes under which the suit was brought are unconstitutional and violative of express constitutional guarantees; and that the filing of the state chancery suit and attachment of funds have caused irreparable injury and violation of rights which cannot be remedied by defense to the state chancery suit. App. a6 through a31.[1] Preliminary and permanent injunctive relief against the continuation of the state chancery proceeding was sought pursuant to 42 U.S.C. §§ 1981 through 1985 with Federal jurisdiction based on 28 U.S.C. §§ 1331 and 1343. Declaratory relief also was requested pursuant to 28 U.S.C. §§ 2201 and 2202. In support of their motion for preliminary injunction, eleven of the plaintiffs filed affidavits in support of the allegations of the amended complaint testifying that the charges of the state chancery suit were untrue — thus indicating that the state chancery suit was brought in bad faith and for purposes of harassment — that the purpose of the selective buying campaign was to secure an end to racial discrimination by peaceful means, and that the effect of the pendency of the state chancery suit was to harass the persons who participated in picketing and boycott activities and to discourage them and their supporters from asserting and securing the rights of Port Gibson blacks to equal treatment.

After a hearing on the motion for preliminary injunction, the District Court held that the plaintiffs were entitled to file the amended complaint as a matter of

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[1]The abbreviation "App." refers to the Appendix filed with this petition.

right, since the defendants had not yet answered, that the court had jurisdiction of the claims presented in the amended complaint on the basis of plaintiffs' contention that the defendants were seeking to deprive plaintiffs' First Amendment rights 'by the utilization of the machinery of the state courts" (50 F.R.D. at 265, App. a60) and granted a preliminary injunction against further prosecution of the pending state suit to protect plaintiffs from further irreparable injury and to preserve the status quo pending a final determination on the merits. App. a32 through a74.

> "The recital of the issues drawn in the State Action, hereinbefore contained, indicates to the Court that plaintiffs can legitimately claim that defendants seek to infringe upon their First Amendment rights, and the prosecution of the State Action will have a chilling effect upon the exercise of those rights. This appears to be a proper case for the issuance of a preliminary injunction to hold the matters in status quo until the rights of the parties can be ascertained. Otherwise, plaintiffs will suffer irreparable injury on account of loss of First Amendment rights pending a solution of the differences between the parties." 50 F.R.D. at 268; App. a68-a69.

The District Court further noted that it had no intention of immunizing plaintiffs from accountability for any conduct not protected by the First Amendment, such as violent acts in support of a boycott, and on appeal the Fifth Circuit issued an interlocutory order

expressly limiting the scope of the preliminary injunction to provide protection to the defendants from any possible violent, threatening, menacing or insulting conduct during the pendency of the litigation.

On appeal by the defendants, who were the complainants in the state chancery suit, from the preliminary injunction against further prosecution of the state chancery suit, the Fifth Circuit vacated the preliminary injunction and ordered that the amended complaint be dismissed for lack of Federal jurisdiction on the ground that "there is no 'state action' to be found in the mere filing of a private civil tort action in state court." 444 F.2d at 1312, App. a101. App. a75 through a101.

REASONS FOR GRANTING THE WRIT

This case raises substantial and as yet unanswered questions, which need to be settled, regarding the jurisdiction of Federal courts, in appropriate cases, to entertain a cause of action for an injunction against bad faith state civil proceedings for injunctive relief and damages brought by private persons pursuant to facially unconstitutional state statutes with the purpose and effect of interfering with constitutionally protected First and Fourteenth Amendment rights to free speech and due process of law.

The decision of the Court of Appeals that there is no Federal jurisdiction to entertain this cause of action conflicts with the decision of this Court in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) and with the decisions

of other courts of appeals in its holding that Federal jurisdiction is lacking to enjoin state proceedings which deny Federal constitutional rights of expression. The Court of Appeals decision also conflicts with the decision of this Court in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) and other decisions in its holding that private persons who seek to deny constitutional rights in effectuation of state policy and with substantial state involvement are necessarily immune from liability under 42 U.S.C. § 1983 because of the "color of law" requirement of that statute. In certain respects the issues presented here resemble those presented in another case currently pending before the Court, *Lynch* v. *Household Finance Corp.*, No. 70-5058, prob. juris. noted, Mar. 1, 1971, 39 U.S.L.W. 3375, on appeal from a decision of a three-judge District Court reported at 318 F Supp. 1111 (D. Conn. 1970).

I. Under The Circumstances Of This Case, Federal District Courts Should Have Jurisdiction Under The Federal Civil Rights And Federal Question Statutes, 28 U.S.C. §§ 1343 and 1331, To Entertain Actions Seeking Injunctive Relief Against Harassing And Bad Faith State Civil Suits Threatening Constitutionally Protected Expression.

In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), and last term in the *Younger* v. *Harris* sextet, 401 U.S. 37 et seq., the Court determined that under special circumstances, persons engaged in Federally protected activities or seeking to be free of bad faith and harassing state criminal prosecutions may have resort

to the equitable jurisdiction and relief provided in Federal civil rights statutes, specifically 28 U.S.C. § 1343 and 42 U.S.C. § 1983, to secure injunctive relief against pending state criminal prosecutions. In the *Younger* decisions it was pointed out that "since all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently [footnote omitted]" 401 U.S. at 55 (concurring opinion of Mr. Justice Stewart, joined by Mr. Justice Harlan). At least two members of this Court in those decisions suggested that District Courts might have greater discretion to intervene in pending state civil proceedings in which the state was not a party, than in pending state criminal prosecutions, because of the greater equitable restrictions upon restrain of criminal prosecutions, *Douglas* v. *City of Jeanette*, 319 U.S. 157, 163-64 (1943), and because the "offense of state interests is likely to be less in a civil proceeding." *Younger* v. *Harris*, 401 U.S. at 55 n. 2 (Stewart and Harlan, JJ.).

This case thus poses significant questions regarding the jurisdiction of Federal courts to deal with threats to Federally protected rights which the Court declined to resolve in the *Younger* cases last term, and which now are ripe for determination. There is no doubt, on the record here presented and on the findings of the District Court, that the petitioners (hereinafter plaintiffs) were engaged in constitutionally protected activities which come within the narrow category of preferred rights which are fundamental to the operation

of democratic processes.[2] The plaintiffs include persons who through picketing, leafleting, and public meetings in Port Gibson, Mississippi, encouraged a boycott of some of the white merchants in that community in order to achieve fair employment practices, fair treatment of black customers, and otherwise to eliminate discrimination through the use of economic pressure. They stand in the same position as the *Dombrowski* plaintiffs, seeking Federal injunctive relief against harassing, bad faith state proceedings, brought pursuant to vague and overbroad state statutes (here providing for both criminal and civil proceedings), which threaten plaintiffs' free exercise of their constitutionally protected First Amendment rights. The only difference is that here the state court proceeding sought to be enjoined is a civil proceeding brought by private parties for damages and injunctive relief, rather than a criminal prosecution.

The Court of Appeals held that because the state proceeding was a civil action filed by private parties rather than a criminal prosecution, the District Court was powerless to entertain the cause of action alleged and powerless to issue a preliminary injunction to maintain the status quo pending a final determination, despite the District Court's finding (not contested by the Court of Appeals) that the pendency of the state court proceeding has a "chilling effect" upon the exer-

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[2]The District Court held: "There is little doubt but that the right of plaintiffs to peacefully picket and boycott the businesses of defendants and urge others to do so, is a right which they can enjoy, guaranteed to them by the first amendment." 50 F.R.D. at 267. See *Amalgamated Food Employees Union, Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

cise of First Amendment rights and that the continuation of the state proceeding posed an imminent threat of grave irreparable injury to the free enjoyment of those rights. If the opinion of the Court of Appeals is allowed to stand, the fundamental role of the Federal District Court as a forum for the protection of federally created constitutional rights will be substantially diminished. The effect would be to shut the doors of the Federal courts to citizens seeking protection of their preemptive Federal constitutional rights from deprivation by persons who, having been precluded by the decisions of this Court from cutting off civil rights advocacy by means of criminal prosecutions, now proceed by civil suits for injunctions and damages under the guise of state laws prohibiting secondary boycotts and conspiracies to restrain trade for the sole purpose of punishing citizens for their advocacy of equal treatment for blacks and intimidating them and others from exercising Federal rights under the First Amendment to achieve the equality guaranteed by the Fourteenth Amendment and Federal civil rights statutes.

The Court of Appeals' determination of lack of Federal jurisdiction derived entirely from its construction of the two Federal civil rights jurisdictional statutes, 28 U.S.C. §§ 1343 and 1331, both of which were construed to require "state action." 444 F.2d at 1308, App. a90.

(A) 28 U.S.C. § 1343(3). This section confers original jurisdiction on District Courts to redress the deprivation "under color of any State law, statute, ordinance, regulation, custom or usage" of any right, priv-

ilege or immunity secured by the Constitution or laws of the United States "providing for equal rights of citizens or of all persons within the jurisdiction of the United States." The Court of Appeals held that jurisdiction was lacking under this section because the state, "by merely holding its courts open to litigation of complaints, does not clothe the persons who use its judicial processes with the authority of the state." 444 F.2d at 1309, App. a93.

The question here is whether this section is to be interpreted to deny Federal jurisdiction when the defendants, the state court complainants, seek to infringe upon plaintiffs' First Amendment rights "by the utilization of the machinery of the state courts" (50 F.R.D. at 265, App. a60). The Court of Appeals appears to hold that Federal jurisdiction is not established unless those seeking to deny Federally protected rights are the equivalent of state officers, "clothe[d] . . . with the authority of the state," but this interpretation conflicts with the recent decisions of this Court upholding the jurisdiction of Federal courts to provide redress when private persons seek to achieve deprivation of Federally protected rights pursuant to state laws or customs which permit or encourage the deprivation, cf. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), with the cooperation of state officials in joint activity, *United States* v. *Price*, 383 U.S. 787 (1966); *United States* v. *Guest*, 383 U.S. 745 (1966), or through the use of state judicial machinery, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Shelley* v. *Kramer*,

334 U.S. 1 (1948). Cf. *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S 1016 (1969).

(B) 28 U.S.C. § 1331(a). This section confers original jurisdiction on District Courts where "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States" There is no express "color of law" requirement in this section. The amended complaint contains six distinct causes of action, each of which alleges that a state statute or procedural rule violates constitutional guarantees, and each of which requests relief from the application of such unconstitutional statutes or rules. In such circumstances, "where the complaint ... is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." *Bell* v. *Hood*, 327 U.S. 678, 681-82 (1946). The amended complaint also properly alleges the requisite amount in controversy (App. a8). Since the defendants have not yet answered to controvert the allegations of jurisdictional amount, the plaintiffs have not yet been required to prove the allegation, *Hague* v. *CIO*, 307 U.S. 496, 507-08 (1939), although sufficient support already has been provided by the defendants' state court damage claim of over $3.5 million, the attachment of over $17,000 in plaintiffs' funds, and the inestimable value of the First Amendment rights sought to be protected, cf. *Giles* v. *Harris*, 189 U.S. 475, 485 (1903).

Thus, all the prerequisites for § 1331(a) jurisdiction are established: the jurisdictional amount is satisfied

and, because the amended complaint alleges violations of First and Fourteenth Amendment rights, the action clearly "arises under the Constitution ... of the United States." If Federal jurisdiction is present, there should be little difficulty with the question of the cause of action. Because the Court of Appeals erroneously grafted a "state action" requirement onto § 1331(a), it did not fully explore the matter of a private cause of action to remedy deprivations by private persons of constitutionally protected rights. The Court in recent decisions has "re-discovered" the protections conferred by the Reconstruction statutes, 42 U.S.C. §§ 1981, 1982, and 1985, against deprivations of Federal civil rights by private persons, e.g. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1969). The authority of what has been considered the principal decision barring a Federal cause of action under these statutes for private deprivations of First Amendment rights, *Collins* v. *Hardyman*, 341 U.S. 651 (1951) was substantially diminished in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), and there are many substantial questions relating to the implications and scope of *Griffin* which should be answered.[3]

In sum, because under the allegations of the amended complaint, defendants have denied and seek further

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[3] If an adequate statutory basis is not present for the cause of action, then this Court has the inherent power to fashion a cause of action to protect paramount constitutional rights — "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, *supra*, 327 U.S. at 684, see *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

to deny plaintiffs' Federal constitutional rights, it is essential that original District Court jurisdiction be available to redress the alleged deprivations. Unless Federal jurisdiction is found to exist, those who seek to frustrate the goals of legitimate civil rights activity will have it within their power, merely by filing unfounded state suits pursuant to unconstitutional state statutes for injunctions and astronomical damages, to destroy legitimate and peaceful efforts to achieve racial equality through advocacy of economic pressure and selective buying.

II. The Decision Below Dismissing Plaintiffs' Amended Complaint Conflicts With The Decisions Of This Court Concerning The "State Action" Requirement Of The Fourteenth Amendment And The Elements Of A Claim Under 42 U.S.C. § 1983.

42 U.S.C. § 1983 provides for equitable relief against "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." Since the Court of Appeals ordered plaintiffs' amended complaint alleging, inter alia, a cause of action under 42 U.S.C. § 1983, dismissed, the Court should examine the sufficiency of the amended complaint according to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). If plaintiffs can prove some state of facts which show that the state chancery suit filed by the defendants meets the "color of law" requirement of 42 U.S.C. § 1983, then the amended complaint by its allegations sets forth a clear-cut case for injunctive relief under Section 1983 to protect plaintiffs' constitutional and statutory rights. *Younger* v. *Harris*, supra; *Dombrowski v. Pfister*, supra.

There is no doubt that § 1983 provides equitable relief against deprivation of the First and Fourteenth Amendment rights to free speech and due process asserted here. *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Further, if the amended complaint states a cause of action under § 1983, then the District Court had jurisdiction under 28 U.S.C. § 1343. See *Monroe* v. *Pape*, 365 U.S. 167 (1961); cf. *Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). The Court of Appeals applied an erroneous legal standard inconsistent with the decisions of this Court when it held that under the circumstances of this case, there was insufficient state action in the pending state chancery court lawsuit to make out a Federal civil rights violation.[4]

[4]The decisions relied upon by the Court of Appeals generally involved damage claims against court officers or attorneys for injuries arising out of alleged abuses of court process. None of the thirteen decisions cited are decisions of this Court, and none involved claims that state proceedings pursuant to unconstitutional state statutes deprived persons of First Amendment rights or were efforts to punish persons for their advocacy of civil rights and equal treatment for blacks.

(a) State authorization of the state chancery suit. This Court has held that private action violates Fourteenth Amendment guarantees when it is authorized or encouraged by the state or by officers of the state, whether such encouragement comes from state statute, *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Robinson* v. *Florida*, 378 U.S. 153 (1964); *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963), or announcement of policy by state officials, *Lombard* v. *Louisiana*, 373 U.S. 267 (1963).

Here the state chancery suit, filed pursuant to state statutes authorizing civil actions for damages and injunctive relief, Miss. Code §§ 2059.3 (Supp. 1971) and 1089, 1090, and 1092 (Recomp. 1956),[5] effectuates the state policy embodied in those statutes and "becomes a manifestation of that policy and is thereby drawn within the ambit of state action." *Adickes* v. *S. H. Kress & Co.*, supra, 398 U.S. at 203 (Brennan, J.). In filing their chancery suit, defendants were "persons" literally acting "under color of" state statutes. Mississippi's "secondary boycott" statute, Miss. Code § 2059.3 (Supp. 1971), recently passed (1968) as part of a cohesive statutory scheme to destroy the increasing efficacy of the civil rights boycott as an instrument for eliminating racial discrimination, directly abridges freedom of expression by authorizing severe criminal penalties and civil liability against persons who "induce or encourage" boycotts of private businesses. See App. a1 to 2. The Mississippi anti-trust statute pro-

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[5]The texts of these statutes are set out in the appendix at a1 through a5.

vides severe criminal penalties and a civil cause of action against "a combination, contract, understanding or agreement, expressed or implied, between two or more persons ... when inimical to the public welfare and the effect of which would be: (a) To restrain trade * * *" Miss. Code § 1088 (1956 Recomp.), see also, Miss. Code § 1089 (1956 Recomp.). Such vague and overly broad standards cannot be reconciled with due process requirements, especially when, as here, an effort is being made to apply them to curtail protected First Amendment activity. See, e.g., *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964); Cf. *Grove Press Inc.* v. *City of Philadelphia*, 418 F.2d 82, 89 (3d Cir. 1969). See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

(b) Governmental function. This Court also has held that when the state delegates, authorizes, or acquiesces in the exercise by individuals of governmental functions, or activities functionally equivalent to those exercised by state bodies or state officials, which deny Federally protected rights, then Federal jurisdiction obtains to redress civil rights violations. *Evans* v. *Newton*, 382 U.S. 296 (1966); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Marsh* v. *Alabama*, 326 U.S. 501 (1946).

The state court complainants, defendants here, are acting as "private district attorneys" seeking relief equivalent to that obtained in a criminal prosecution — it matters little to the defendants in the state suit whether they are fined $5,000 (first offense) or $10,000 (second offense) under the anti-trust statute, Miss. Code § 1088, or subjected to damages in the amount of $3.5 million. If district courts have Federal jurisdic-

tion to enjoin pending state court criminal proceedings brought by the state to punish plaintiffs for their exercise of Federally protected rights, especially those secured by the First Amendment, then Federal jurisdiction should be equally available to enjoin pending state civil actions brought by private parties who are engaged in an equivalent function, and whose harassing suits, if successful, will have the same effect.

(c) Compulsory state civil process. It has long been established that the use by private persons of state judicial machinery to achieve constitutionally impermissible ends constitutes state action in violation of secured constitutional guarantees. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Shelley* v. *Kramer*, 334 U.S. 1 (1948). When private litigants, bent on harassing and interfering with the exercise of constitutionally protected rights, commence their action in state court to attain that end, and thus, from the initiation of the action are "supported by the full panoply of state power" (*Shelley* v. *Kramer*, supra, 334 U.S. at 19), it cannot be said that the act of initiating the litigation is free of state involvement: the complaint invokes state statutory or common law authority for the cause of action, it is filed according to state law civil procedure, and the complainants obtain compulsory process by service of the complaint and summons which provides, that if the defendants should default and not answer, the complainants may obtain default judgment and utilize the full scope of judicial and executive machinery for the execution of the judgment. The initiation of such state-authorized procedures alone, like the arrest of persons engaged in Federally

protected activity, cf. *Georgia* v. *Rachel*, 384 U.S. 780 (1966), may result in the chilling of the exercise of First Amendment freedoms.

(d) Utilization of pre-judgment attachment process. The procedure is even more chilling, and the quantum of state involvement greater, where, as here, the state court complainants, in their effort to punish plaintiffs for their exercise of Federally protected rights, summarily obtained chancery attachments under Mississippi's non-resident, absent or absconding debtor statute, Miss. Code § 2730 (Recomp. 1956), of the funds of plaintiffs many of whom were not even named as defendants in the chancery complaint, and none of whom were amenable to attachment within the terms of the statute, without any prior notice or hearing in violation of plaintiffs' rights to due process of law, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). The Court of Appeals assumed that the implementation of this attachment procedure, taken alone, was sufficient state action to establish Federal jurisdiction to enjoin the state court attachments (App. a98), cf. *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970), but dealt with the attachments as a separate matter, because initially contested in the original complaint, and neglected to consider the jurisdictional implications of the use of the attachment procedures as an integral part of the cause of action alleged in the amended complaint, which it was.

(e) Threatened judicial action. The action of state courts in imposing penalties or damages or in otherwise depriving parties of secured rights clearly con-

stitutes a Fourteenth Amendment violation. *New York Times* v. *Sullivan*, supra; *Shelley* v. *Kramer*, supra. Thus, in *American Federal of Labor* v. *Swing*, 312 U.S. 321 (1941), enforcement by state courts of the common-law policy of the state which resulted in the restraining of peaceful picketing was held to be state action prohibited by the Fourteenth Amendment's guarantees of free speech. If state judicial action restricting free speech denies First-Fourteenth Amendment rights, then, as this Court held in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), the threat of state judicial action inhibiting Federally-protected free speech should be equally actionable, since where First Amendment rights are concerned, "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The District Court in this case found such a threat of irreparable injury to First Amendment rights to exist, and the Court of Appeals did not challenge its findings of fact in issuing the preliminary injunction. Under these circumstances, anticipatory Federal injunctive relief against the pending state court litigation is necessary to protect plaintiffs' Federally secured rights because "those rights will inevitably be denied by the very act of bringing the [plaintiffs] to trial in the state court." *Greenwood* v. *Peacock*, 384 U.S. 808, 828 (1966).

In sum, the decision of the Court of Appeals seems irreconcilable with the decision of this Court in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), which again put to rest the discredited notion "that a *private* person is necessarily immune from liability under § 1983 be-

cause of the 'under color of' law requirement of the statute," 398 U.S. at 173, n. 44, and reversed a summary judgment against the plaintiff on the grounds that plaintiff had alleged elements of state involvement, overlooked by the lower courts in their decisions, which, if established, would sustain a claim for relief under Section 1983.

III. The Exercise Of Federal Jurisdiction Of The Amended Complaint Is Supported By Fundamental Equitable Considerations.

In support of its decision that there was no Federal jurisdiction of the amended complaint, the Court of Appeals also suggested that despite the finding by the District Court of irreparable injury to First Amendments rights flowing from the very pendency of the state suit, plaintiffs had remedies in the state court and that this was a case for Federal abstention. 444 F. 2d at 1310-11, App. a96-a97. This determination overlooks the sensitive nature of the rights asserted, and conflicts with the many decisions of this Court to the effect that when the challenge is to the constitutionality of the state statutes themselves and where the proceedings under the statutes threaten or deny free expression or other fundamental Federal rights, the Federal rights asserted are too precious to be lost or jeopardized pending uncertain proceedings in the state court which may or may not ultimately result in the recognition of plaintiffs' pre-emptive Federal constitutional rights. *Dombrowski* v. *Pfister*, supra; *Baggett* v. *Bullitt*, supra; *Zwickler* v. *Koota*, 389 U.S. 241 (1967). This holding also flies in the face of the decisions of a majority of

the courts of appeals which have considered the question, including the Fifth Circuit itself, which have held that where Federal rights are threatened or denied by state proceedings, civil or criminal, District Courts do have jurisdiction in actions brought pursuant to 42 U.S.C. § 1983 in appropriate cases to enjoin the pending state proceedings to protect Federal rights.[6]

This is not a case where mere defense to the state court proceeding is sufficient to protect the constitutional rights threatened and denied by the state chancery suit. First, the state court already has refused to dismiss the bill of complaint or to dissolve the unconstitutional attachment of funds. Second, plaintiffs' proof establishes that the pendency of the state proceeding alone has caused grave irreparable injury and substantially deterred the exercise of First Amend-

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[6] First Circuit: *Strasser* v. *Dooley*, 432 F.2d 567 (1970) (dictum)

Second Circuit: *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692 (1966) (action not brought under § 1983 but to protect rights secured by the Securities and Exchange Act)

Third Circuit: *Nat'l Land and Investment Co.* v. *Spector*, 428 F.2d 91 (1970); *DeVita* v. *Sills*, 422 F.2d 1172 (1970); *Grove Press* v. *City of Philadelphia*, 418 F.2d 82 (1969); *Cooper* v. *Hutchinson*, 184 F.2d 119 (1950).

Fifth Circuit: *Duncan* v. *Perez*, 445 F.2d 557 (1971); *Sheridan* v. *Garrison*, 415 F.2d 707 (1969), cert. denied, 396 U.S. 1040 (1970); *Machesky* v. *Bizzell*, 414 F.2d 283 (1969).

Sixth Circuit: *Honey* v. *Goodman*, 432 F.2d 333 (1970).

Contra circuits are:

Fourth Circuit: *Pruitt* v. *Campbell*, 429 F.2d 642 (1970); *Baines* v. *City of Danville*, 337 F.2d 579 (1964), cert. denied, 381 U.S. 939 (1965).

Seventh Circuit: *Smith* v. *Village of Lansing*, 241 F.2d 856 (1957). But see, *Landry* v. *Daley*, 288 F. Supp. 200 (N.D. Ill. 1968), appeal dismissed, 393 U.S. 220 (1968).

ment protected rights. Third, persons who have been deterred from picketing and racial protests by the state suit, and organizations whose funds have been frozen by the attachments and whose activities have been hampered by the filing of the state proceeding — including the autonomous NAACP State Conference and county branches — are not defendants in the state suit and thus are not able to assert their rights in the state forum. Thus, this is one of those special cases where defense in the state courts is a "course" which "would not afford adequate protection," *Fenner* v. *Boykin*, 271 U.S. 240, 243-44 (1926), to the Federal rights asserted.

Given the allegations of the amended complaint, and the proof already adduced, the action of the Court of Appeals in dismissing the complaint altogether should be held to be clearly erroneous. The complaint sets forth allegations which, if established, should entitle the plaintiffs to final injunctive relief. Moreover, if the Court finds on equity grounds that final injunctive relief would not be appropriate, plaintiffs should still be entitled to declaratory relief on their claims challenging the constitutionality of the statutes invoked in the state chancery suit. On this issue, the decision of the Court of Appeals that the amended complaint should be dismissed altogether conflicts with the firmly established notion that "the abstention doctrine is inappropriate for cases ... where ... statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister*, supra, 380 U.S. at 489, 390; *Zwickler* v. *Koota*, supra. Since the plaintiffs

are exposed to the imminent threat of civil liability under those statutes in the state chancery suit, there is a ripe legal conflict of sufficient immediacy and reality to warrant at least the issuance of a declaratory judgment. Cf. *Golden* v. *Zwickler*, 394 U.S. 103 (1969). On this theory, that the plaintiffs were at least entitled to declaratory judgment regarding the constitutionality of these state statutes, the Court of Appeals should have remanded the case to the District Court for further proceedings, not with instructions "to dismiss the amended complaint for lack of jurisdiction." 444 F.2d at 13 , App. a101.

IV. The District Court Had Jurisdiction To Issue A Preliminary Injunction Temporarily To Preserve The Status Quo Pending Its Determination Of Whether A Permanent Injunction Was Permissible And Required.

The District Court held that the allegations of the amended complaint, and the proof presented by the plaintiffs, established "a proper case for the issuance of a preliminary injunction to hold the matters in status quo until the rights of the parties can be ascertained." 50 F.R.D. at 268, App. a69. The decisions of this Court make it clear that where jurisdictional questions are presented with regard to the rights of plaintiffs to Federal relief, District Courts "unquestionably" have inherent power "to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction" to grant the requested relief. *United States* v. *United Mine Workers*, 330 U.S.

258, 290 (1947). Cf. *United States* v. *Shipp*, 203 U.S. 563 (1906).

Under these circumstances it is desirable that upon a prima facie showing that if prosecution of the state court lawsuit is permitted "plaintiffs will suffer irreparable injury on account of loss of First Amendment rights," 50 F.R.D. at 268, App. a69 the status quo should be maintained pending a decision of whether an injunction will lie. Completion of the state court proceedings, unless temporarily restrained, will make the question moot. See Note, 50 Va. L. Rev. 1404, 1426-27 (1964). Thus, the preliminary injunction issued here comes within one of the three express exceptions to the prohibitions of 28 U.S.C. § 2283, and is expressly authorized by that section, because the preliminary injunction issued by the District Court was "necessary in aid of its jurisdiction" to prevent the Federal claim from being rendered moot. Such a preliminary injunction against pending state court proceedings which are alleged to violate Federally protected rights was held to be authorized in *Baines* v. *City of Danville*, 321 F.2d 643 (4th Cir. 1963) to prevent the controversy from becoming moot, even though the question of jurisdiction subsequently was determined adversely to those seeking Federal injunctive protection, *Baines* v. *City of Danville*, 337 F.2d 579, 593-94 (4th Cir. 1964), cert. denied, 381 U.S. 939 (1965). Cf. *United States ex rel. Weisman* v. *Brown*, 281 Fed. 657 (8th Cir. 1922).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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